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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 836

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

PETITIONER'S REPLY TO RESPONDENTS' BRIEF.

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Of Counsel.

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF.*

*Reply briefs by petitioners are recognized in practice. Hughes, *Federal Practice*, Vol. 8, § 6267.

OPINIONS BELOW.

We correct an oversight in the petition. The District Court's opinion, findings of fact and conclusions of law are reported in 61 F. Supp. 265. The opinion of the Circuit Court of Appeals (Ninth Circuit) has just been reported in 157 Fed. (2d) 876.

THE FACT THAT AT ONE TIME THE SOFT COAL MINERS HAD A SEVEN HOUR DAY DOES NOT ALTER THE FACT THAT THEY ARE NOW AND FOR YEARS PAST HAVE BEEN REGULARLY WORKING NINE HOURS.

Respondents urge by way of reply that because the coal miners had at one time a regular seven hour day this distinguishes their case, and though it has been customary for the coal miners in recent years to work longer hours than 7 per day that these 8th and 9th hours of each day may be lawfully characterized as "overtime" and paid for accordingly. This is to ignore the axiomatic fact that when the coal miners work more hours *regularly* every day, these regularly worked extra hours cannot be differentiated in any basic way from those hours designated as "overtime" in the instant case. That the reasoning of respondents' counsel is erroneous and that the coal industry is confronted with the identical question here presented is convincingly established by excerpts from a transcript of proceedings of a meeting of the "Coal Conference", which has come to our attention since filing the petition and which excerpts are added hereto as "Appendix A." The Wage and Hour Administrator's

attention was there called to this very "seven hour day" situation in the coal industry, and the discussion which took place at the conference is proof that the question here involved is a live one as far as the coal mining industry is concerned and one that, according to the Wage and Hour Administrator, can only be answered by the Courts. This fact furnishes cogent reason why this question should receive the attention of this Court at this time.

THIS COURT HAS RECENTLY GRANTED CERTIORARI IN THREE CASES INVOLVING SIMILAR QUESTIONS AND PRINCIPLES.

This Court's attention is respectfully called to the following cases, which have only come to our attention since the docketing of the petition and in each of which petitions for certiorari have been granted:

Walling v. Halliburton Oil, etc. Co. (Docket No. 74);

Madison Avenue Corp. v. Asselta, et al. (Docket No. 497);

Walling v. General Industries Co. (Docket No. 564).

While the facts of these pending cases differ in some respects, the underlying principles and questions presented are the same as in the instant case and involve:

(1) An interpretation of Sec. 7(a) of the Fair Labor Standards Act;

(2) Agreement by employers and employees on a somewhat similar wage formula;

(3) Adoption of a "regular" hourly rate which was constant and paid in actual practice, with "overtime" calculated and paid at 150% of the regular rate;

(4) Whether "overtime" must be paid only for hours at the end of the week "after" and "following" the first 40 hours of straight time and specifically designated as "overtime".

In the cases above noted regular time and overtime were combined and paid for in a lump sum, and overtime payment made for hours "in excess of" 40 per week rather than for hours "following" the first 40, the very question here involved.

LONGSHOREMEN AS WELL AS COAL MINERS HAVE BEEN WORKING UNDER A SPLIT-DAY PLAN.

On the day that this petition was docketed, Jan. 6, 1947, Judge Rifkind, United States District Judge of the Southern District of New York, handed down a decision in the cases of *Addison v. Huron Stevedoring Corp.* and *Aaron v. Bay Ridge Operating Co.* (Civ. 33-212 and 213) establishing the fact that longshoremen as well as the coal miners have been working under a wage system whereby the day's wages have been split into hours of regular time and overtime. The overtime hours were there distributed through the days of the week instead of being concentrated at the week's end after 40 hours of regular time had been worked. This is the situation in the instant case. Judge Rifkind held that this splitting of the day was

not a violation of the Act and that Sec. 7 of "the Statute clearly does not speak of premium payments for hours *following* the first forty, but only for hours in *excess* of forty." This is the exact reverse of the ruling of the Appellate Court below and indicates that there is a wide divergence of opinion on this point in the Federal Courts which should be finally decided here and also that this question is of far reaching public interest because it involves not only the coal miners but the longshoremen as well.

This Court has many times refused to substitute "shadow for substance" or, as Mr. Chief Justice Hughes once expressed it, has refused "to make a legal fiction dominate realities" (298 U.S. 211), which is just what the Appellate Court has done here. Certiorari should be granted.

Dated, San Francisco, California,
February 3, 1947.

Respectfully submitted,
WM. E. COLBY,
Counsel for Petitioner.

GEO. W. WILSON,
Of Counsel.

(Appendix A Follows.)

Appendix A

United States Department of Labor

Wage and Hour and Public Contracts Divisions

In the Matter of:

COAL CONFERENCE

Before

L. Metcalfe Walling, Administrator

May 17, 1946, Room 1213, U. S. Department of Labor
165 West 46th Street, New York 19, New York

PRESENT

WAGE AND HOUR STAFF:

L. Metcalfe Walling, Administrator, et al.

COAL OPERATORS:

Robert R. Bruce, Anthracite Operators, Attorney 40 Wall Street, New York, N. Y.

J. B. Morrow, President, Pittsburgh Coal Company, Operators Committee, Pittsburgh Coal Company, Pittsburgh, Pa.

G. M. Thursby, Bituminous Operators, Frick Bldg., Pittsburgh, Pa., et al.

(Excerpts from transcript of conference.)

"Mr. Bruce. Yes, I mean a case where it is obvious an employee in a suit under Section 16 (b) would have

no recovery because we pay him more than 7 (a) required. Have we violated the Act? The Act is intended to give a certain amount of money to an employee for hours in excess of 40. We will assume there is no question of minimum because there wasn't any in the case. We have paid that quantity of money. Have we violated the Act by virtue of the fact that formally and as a matter of record keeping, we didn't pay rate and a half on the four and six cent shift differential?

Administrator Walling. When you said they paid that quantity of money, you mean, are they entitled to credit for the daily overtime beyond the seventh hour to offset the failure to pay the shift differential? Is that it?

Mr. Bruce. That is another way of putting it, yes, sir.

Administrator Walling. Well, I am not prepared to give you today a final legal statement on that. I will outline to you what I think the considerations are. *The question, of course, is whether the fact that you have been consistently working a longer work day than the seven-hour day which your contract provides for at straight time for a period of some years now, affects the overtime nature of that pay which you are giving for the eighth and successive hours and whether it thereby increases the regular rate of pay.* Now, as you know, the Supreme Court has said in a case which is not by any means identical with yours but is somewhat similar, in dealing with the so-called Poxon

plan that you cannot make an arbitrary division between regular time and overtime. Now, the Poxon plan was different, of course, from your arrangement because it is perfectly obvious there that the assignment of what was straight time and of what was overtime was purely arbitrary and had no relationship to a normal work week schedule, whereas your plan was a war time modification, as I understand it, of what had been a well-established work day in the industry. The question is whether that variation is significant enough to take it out from the doctrine of the Poxon plan or not, and you have, as I understand it, along with the union, assumed that this overtime credit could be set off against any weekly overtime obligation, and you have proceeded on that basis. We certainly aren't at this time prepared to say that that cannot be done. * * *

Administrator Walling. I will make this statement to you right here and now. If at any time we do have occasion to question it, you will be notified. We are not questioning it today, and *whether there will be in the future a court decision, which will require us to question it, I am not going to predict;* but at the present we are not taking the position that you may not credit the eighth and successive hours against the overtime. If we do take that position, you will be duly notified and we will not creep up from behind and catch you unaware.

Mr. Bruce. If I understand your remarks, Mr. Walling, though, you are not approving our present practice?

Administrator Walling. Well, I would like to put it this way: I am not disapproving. *Only a court can give you final and binding legal approval.* * * *

Administrator Walling. Well, that is something which one of you brought up and I answered the question as directly as I can, because I think it is only fair to you to point out all the considerations which will go to influence the court in its ultimate decision, if there is ever a court test on the question. I think I indicated that I considered that yours is certainly not identical with the Poxon plan, but that I think the test of whether you are entitled to a setoff or not is whether this is bona fide overtime or whether it is a regular rate of pay in disguise.

Mr. Bruce. What you are saying in effect is that—which I think the coal operators should take notice of—that *there is a possibility that the courts might say that anything over any work week less than 40 hours for the purposes of the Wage and Hour Law is an arbitrary work week.* That is what you are suggesting might be so, but the Wage and Hour Division is not taking that position as at the present day, *and no matter how long established that work week has been less than 40 hours, it would not be regarded as a valid breaking point between straight time and overtime for the purposes of the Wage and Hour Law.*

Administrator Walling. * * * if at any time, a decision has to be made *because of court decisions which subsequently come down* or because we feel on closer analysis of those which have already come down

that we have to do it, we shall advise you before we do it. I think that is all that I can say to you today, since *I am not clothed with the power to make binding legal commitments, as you well know, of the interpretation of this law.* I am only a guesser, like yourselves. * * *

Mr. Morrow. I would like to ask a question, Mr. Walling. It is rather hypothetical, perhaps, but supposing some agency of the government introduced a contract, as has been done in the past, and you were forced—perhaps it is not quite the right word, but almost—to sign that contract. Are we liable under Wage and Hour for a contract made by some other agency of the Government? * * *

Administrator Walling. I should hope that any decision which might be reached would be within the frame work of the Fair Labor Standards Act. But *in any event the courts will give you the answer on that.*

Mr. Thursby. Mr. Walling, before we leave this point of shift differentials in particular, there is the calculation of court decisions in the matters we have considered, and the court holds and your fears might be realized, that *would mean that we would have to pay overtime beyond 40 hours on each rate that is paid,* is that right, *regardless of any accretions of overtime* in excess of time and a half beyond 40 hours that is paid on some other rate?

Administrator Walling. First, let me amend your statement, if I may, by deleting the words 'my fears,'

because that doesn't represent my point of view. As to the question of what your obligation would be, *your obligation under the law simply is to pay a 50 per cent premium on the overtime hours beyond forty.* Now, if you have a credit that you can offset against that, then to that extent you have reduced your obligation. Now, *if you aren't allowed any credit, then, of course, you haven't taken care of the obligation.*

Mr. Thursby. That is, the credit would only come through some other rate that is paid?

Administrator Walling. Some other overtime rate, that is right, because *you cannot credit against overtime pay that which is not paid for overtime purposes.* * * *"

(Emphasis in all the foregoing excerpts supplied.)